Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 88-367

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY RUGGIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for violating the RICO statute.

2. Whether former 18 U.S.C. (1982 ed.) 4205(b)(1) (repealed as of November 1, 1987) gave the district court authority to direct that petitioner serve 13 years of his 40-year sentence before becoming eligible for parole.

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OPINIONS BELOW

The order of the court of appeals affirming petitioner's conviction (Pet. App. 1a) and the order entered on petitioner's petition for rehearing (Pet. App. 2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1988. A petition for rehearing was denied on June 30, 1988. The petition for a writ of certiorari was filed on Monday, August 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c) (Racketeer Influenced and Corrupt Organizations (RICO)); conspiring to engage in racketeering, in violation of 18 U.S.C. 1962(d) (RICO conspiracy); and making an extortionate extension of credit, in violation of 18 U.S.C. 892(a). He was sentenced to consecutive 20-year terms of imprisonment on the RICO counts and to a concurrent 20-year term on the extortionate credit count. The court specified that petitioner was to become eligible for parole following the service of 13 years' imprisonment.

The evidence at trial showed that in 1981 petitioner told Joseph Iannuzzi that he planned to establish a gambling club in Palm Beach County, Florida, and that he wanted Iannuzzi to operate a bar on the premises and act as a front man (104 R. 175). Petitioner directed Iannuzzi to arrange for police chief William Darden, whom petitioner knew was corrupt, to provide protection for the club, and Iannuzzi did so (104 R. 175-195). Iannuzzi, who had previously agreed to cooperate with the FBI after a friend of petitioner brutally beat him for failing to make interest payments on a loan (104 R. 108-112), subsequently introduced undercover FBI agent John Bonino to petitioner, explaining that Bonino would serve as Iannuzzi's partner in the operation of the bar (105 R. 261). Iannuzzi and Bonino told petitioner that they had located a suitable suite of rooms for the bar and gambling club and showed it to him; petitioner told them where the blackjack tables should be located and said that he would have his own dealers come down from New York when the club opened (105 R. 264; 110 R. 912-915). Over dinner, petitioner told Iannuzzi and Bonino that he was a captain in the Gambino organized crime family (110 R. 925-926).

Iannuzzi and Bonino later told petitioner that they needed $25,000 to finish the construction of the bar. Petitioner said that he would lend them the money at two "points" per week, or 104% per year (105 R. 307). Iannuzzi and Bonino were subsequently given $10,000 in cash at petitioner's house (105 R. 333). Petitioner directed Salvatore Reale, who was at petitioner's house at the time, to bring the other $15,000 from New York and give it to Iannuzzi and Bonino, which he did (105 R. 349-359). Reale advised Iannuzzi and Bonino to maintain a good relationship with him, since they might need another loan, and he told them that they had been given the loan on good terms, since five points per week was their regular rate (110 R. 993-994). After Iannuzzi and Bonino had made some payments on the loan (105 R. 373; 106 R. 435; 107 R. 507), the FBI closed its undercover operation.

The court of appeals affirmed without opinion (Pet. App. 1a). In denying a petition for rehearing, the court cited (*id.* at 2a) its earlier decision in *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), petition for cert. pending, No. 87-7205, in response to petitioner's claim that his 13-year minimum sentence was unlawful.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the evidence was insufficient to sustain his conviction on the RICO counts. The statute prohibits conducting an enterprise's affairs "through a pattern of racketeering activity or collection of unlawful debt" (18 U.S.C. 1962(c)), and petitioner was charged under both prongs. Petitioner does not claim that the evidence was insufficient to support his conviction under the "pattern of racketeering activity" prong. Indeed, the evidence was more than sufficient to support a conviction for engaging in a pattern of racketeering activity, as

the government proved that he bribed a police officer, made an extortionate extension of credit, and conspired to operate a gambling facility, which were the predicate acts charged.

Petitioner contends only that the jury might have convicted him under the "collection of unlawful debt" prong, and he argues that the evidence was insufficient in that respect. The statute defines "unlawful debt," in pertinent part, as a debt incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate" (18 U.S.C. 1961(6)). It is undisputed that petitioner's 104% loan was an "unlawful debt" under Section 1961(6), since an interest rate exceeding 18% is usurious under Fla. Stat. Ann. § 687.071 (West 1966 & Supp. 1988). However, petitioner contends that the government did not prove that he was involved in "the 'business' of lending money," since the evidence revealed only a single usurious loan (Pet. 8-9).

There is no merit to petitioner's contention. While the RICO statute provides that "at least two acts of racketeering activity" must be proved to support a conviction under the "pattern of racketeering activity" prong (18 U.S.C. 1961(5)), it does not require that more than one usurious loan be proved to support a conviction under the "collection of unlawful debt" prong. See *United States* v. *Pepe*, 747 F.2d 632, 661 (11th Cir. 1984). The jury instructions, to which petitioner did not object, correctly stated that Section 1961(6) requires that the government prove that "the debt was incurred in connection with the business of lending money at a rate usurious under State law" (115 R. 1660). The jury reasonably could have concluded that petitioner made the usurious loan to Iannuzzi and Bonino in connection with such a business. Most obviously, petitioner directed Reale to deliver the remainder of the loan

to Iannuzzi and Bonino, and, when he did so, Reale told them they were getting a favorable rate and suggested that they might later need another loan (105 R. 349-359; 110 R. 993-994). That statement indicates that petitioner and Reale were engaged in making usurious loans as a regular business activity. The evidence at trial therefore satisfied each of the elements of the racketeering offense, both on the "pattern of racketeering activity" prong and the "collection of unlawful debt" prong charged in the indictment. Thus, whether the jury based its verdict on the first prong, the second prong, or both, the evidence was sufficient to support petitioner's conviction.

2. Petitioner also contends (Pet. 9-11) that the district court lacked the authority to provide that he would be ineligible for parole for 13 years. Three courts of appeals have held, contrary to the court below, that judges sentencing under the pre-1987 federal sentencing scheme could not mandate a minimum sentence longer than ten years. *United States* v. *DiPasquale*, No. 87-1513 (3d Cir. Oct. 7, 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); and *United States* v. *Fountain*, 840 F.2d 509 (7th Cir. 1988). Those courts have relied on 18 U.S.C. (1982 ed.) 4205(a) (repealed), which provided that federal prisoners were generally eligible for parole "after serving one-third of [a term of years] or after serving ten years of a life sentence or of a sentence of over thirty years." Three other courts of appeals have agreed with the court below that under that sentencing scheme a minimum sentence of up to one-third of the maximum sentence was permitted. *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); and *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475

U.S. 1020 (1986). Those courts have noted that Section 4205(a) applied "except to the extent otherwise provided by law," and have relied upon 18 U.S.C. (1982 ed.) 4205(b)(1) (repealed), which provided that a sentencing judge could designate "a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." Despite the conflict in the circuits, this issue does not warrant this Court's review because the issue is of no continuing importance since Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

If the Court should strike down the sentencing guidelines established by the Sentencing Reform Act in *United States* v. *Mistretta,* No. 87-1904 (argued Oct. 5, 1988), it may also conclude that other provisions of the Act are not severable, including the provisions repealing Section 4205. Even in that event, however, this case would not warrant review. Since he received a 40-year sentence, petitioner is ineligible for parole for at least ten years. Because of his criminal record and his leadership role in organized crime,* we think it very unlikely that the Parole Commission would decide to grant him parole after only ten years. In light of the low probability that the 13-year minimum sentence will have any effect on petitioner, review by this Court is not warranted.

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* The sentencing memorandum filed by the United States Attorney noted that petitioner was convicted in 1946 by a court-martial for being AWOL in time of war and was sentenced to five years' imprisonment. Shortly after his release, petitioner was convicted of attempted burglary. Petitioner subsequently became involved with organized crime. In 1970, he served 30 days in jail on a civil contempt charge

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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rather than testifying before a grand jury investigating bookmaking, narcotics, and infiltration of labor unions by organized crime in the New York area. In 1977, he was convicted of criminal contempt and sentenced to one year in jail after refusing to testify before another grand jury investigating organized crime's attempts to acquire police protection for illegal gambling operations in the New York area. In 1983, he was convicted of contempt of court and sentenced to one year in jail for evading subpoenas issued by a grand jury investigating loansharking. Petitioner had been indicted on that charge in New York in 1980 but had fled to Florida, where he became involved in the activities leading to his conviction in this case. The sentencing memorandum also noted that tape recordings made by Iannuzzi documented that petitioner bragged about his participation in organized crime and documented that petitioner had operated a gambling club in New York in the 1970s.

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